

IN THE SUPREME COURT OF NEW ZEALAND

SC 31/2009  
[2009] NZSC 63

BETWEEN	DARIN JOSEPH GARDNER Applicant
AND	THE QUEEN Respondent

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: B J Hart for Applicant  
M D Downs for Crown

Judgment: 16 June 2009

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JUDGMENT OF THE COURT

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**The application for leave to appeal is dismissed.**

**REASONS**

[1] The applicant was convicted of two counts of murder after an incident in which he twice deliberately drove a motor vehicle into a group of people. He attempted to run defences of self-defence and provocation. After dismissal of his conviction appeal by the Court of Appeal he seeks to appeal to this Court on two grounds. First, he calls in aid portions of this Court's judgment in *R v Timoti*,<sup>1</sup> arguing that he killed the two deceased by "accident or mistake" in terms of s 169(6) of the Crimes Act 1961, while under the influence of provocation given by other persons. But, as the Court of Appeal has pointed out, he himself admitted that he was not trying to kill the people who had provoked him. This Court said in *Timoti*<sup>2</sup> that the subsection applies where the provoker is the target of the offender's actions

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<sup>1</sup> [2006] 1 NZLR 323.

<sup>2</sup> At para [26].

but another person suffers the consequences. Here that was not the position for the persons whose conduct provoked Mr Gardner were not the target of his actions. Any suggestion that he considered that the victims were part of the group who caused the provocation is negated by the way in which the defence was run at trial. Clearly defence counsel did not put the defence on the basis that the victims were ever seen by Mr Gardner as part of the provoking group.

[2] The second proposed ground of appeal is that the jury may have been intimidated in the environment of a small courtroom by the presence and attitudes of members of the families of the victims. This was an issue which was explored by the Court of Appeal with the assistance of affidavit and viva voce evidence but was rejected. That was understandable as neither the trial Judge nor Court staff had received any complaint from a jury member or otherwise seen any basis for concern during the trial. The matters raised on behalf of the applicant have not been substantiated and there is no appearance of any miscarriage of justice.

Solicitors:  
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